SELANGOR PILOT ASSOCIATION (1946) v. GOVERNMENT OF MALAYSIA & ANOR.

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Ali F.J.) March 8, 1975]

[Kuala Lumpur — Federal Court Civil Appeal No. 105 of 1974]

Constitutional Law — Act of Parliament prohibiting persons who are not authority pilots from acting as pilots in pilotage district — Whether Act ultra vires the constitution — Whether there is compulsory acquisition of property — No provision for compensation — Whether goodwill property — Federal Constitution, arts. 13 and 74.

This was an appeal from the decision of Abdul Hamid J. ([1974] 2 M.L.J. 123). The appellants had been carrying on the business of providing pilotage services within certain areas of the port and they had in fact a monopoly of that business. The Port Authorities Act 1963 was amended by the Port Authorities (Amendment) Act, 1972 which added two new sections, the effect of which was to prohibit the appellants from carrying on their business within the pilotage districts. The second respondents the Lembaga Pelabohan Kelang took over the physical assets of the appellants and paid compensation for them. The appellants asked for compensation for loss of goodwill and loss of future profits but this was refused. They applied for a declaration that they were entitled to compensation for the goodwill of their business. Alternatively they claimed a declaration that section 35A (added by the Port Authorities (Amendment) Act was unconstitutional as it was inconsistent with Article 13 of the Federal Constitution). The learned trial judge dismissed the application and the appellants appealed to the Federal Court.

Held, allowing the appeal: (1) a person may be deprived of his property or his property may be acquired by or on behalf of the State by a mere negative or restrictive provision interfering with his enjoyment of the property, even if there has been no transfer of the ownership or right of possession of the property to the State or to a corporation owned or controlled by the State;

(2) in this case as the impugned section 35A has the effect of depriving the appellants of their property and as it did not provide for adequate compensation, it contravened Article 13 of the Federal Constitution;

(3) there should therefore be a declaration that the plaintiffs are entitled to compensation for the goodwill of their business of which they have been deprived.

Cases referred to:-

(1) *Dwarkadas Shrinivas* v. *The Sholapur Spinning & Weaving Co. Ltd. and others* A.I.R. 1954 S.C. 119.

(2) *Ulster Transport Authority* v. *James Brown & Sons Ltd.* [1953] N.I. 79.

(3) *Frances Fenwick* v. *The King* [1927] 1 K.B. 458.

(4) *Northern Road Transport Board* v. *Benson* [1940] N.I. 133.

(5) *State of West Bengal* v. *Subodh Gopal Bose and others* A.I.R. 1954 S.C. 92.

(6) *Saghir Ahmad and another* v. *State of U.P. and others* A.I.R. 1954 S.C. 728.

(7) *Deep Chand and others* v. *State of Utter Pradesh and others* A.I.R. 1959 S.C. 648.

(8) *Northern Road Transport Board* v. *Benson* [1942] A.C. 520.

(9) *Commissioners of Inland Revenue* v. *Muller & Co.'s Margarine Ltd.* [1901] A.C. 217, 223.

(10) *Mahbub Begum* v. *Hyderabad State* A.I.R. 1951 Hyd. 1.

FEDERAL COURT.

S. Sothi for the appellants.

Abu Talib bin Osman (Senior Federal Counsel) for the first respondent.

Abdullah bin Mohamad Yusof for the second respondent.

Suffian L.P.: At the outset I would like to say that Ali F.J., concurs with both judgments which I am about to read.

The plaintiffs are a firm registered under the Registration of Businesses Ordinance, 1956.

Members of the firm were licensed as pilots under the Merchant Shipping Ordinance. They were licensed for the specific area of Port Swettenham harbour. Between 1946 and April 30, 1956, only the plaintiff firm provided pilotage services in that harbour, though there was no bar to others doing the same.

In 1972 Parliament added a new section 29A and a new section 35A to the Port Authorities Act, 1963, by the enactment of The Port Authorities (Amendment) Act, 1972, Act A99.

These two new sections read as follows:

"29A. (1) The authority may from time to time by notification in the *Gazette* declare any area in the port or the approaches to the port to be a pilotage district.

(2) Every such declaration shall define the limits of the pilotage district.

(3) Notwithstanding the provisions of the Merchant Shipping Ordinance, 1952, the provisions of this Part shall apply to any pilotage district declared under this section.

35A. (1) Any person who, not being an authority pilot, engages in any pilotage act or attempts to obtain employment as a pilot of a vessel entering or being within any pilotage district shall be guilty of an offence under this Act and shall be liable on conviction to a fine not exceeding one thousand dollars.

(2) Any master or owner of a ship entering or being within any pilotage district who knowingly employs as pilot any person who is not an authority pilot shall be guilty of an offence under this Act and shall be liable on conviction to a fine not exceeding one thousand dollars.

(3) For the purposes of this section an authority pilot acting beyond the limits for which he is licensed or in contravention of any conditions imposed under the provisions of section 29H, shall be deemed not to be an authority pilot.

(4) Any person may, without subjecting himself or his employer to any penalty, act as the pilot of a vessel entering or leaving any pilotage district when such vessel is in distress or under circumstances making it necessary for the master to avail himself of the best assistance that can be found at the time."

The Lembaga Pelabohan Kelang (the Port Klang Authority), the second defendant, is an authority within the meaning of subsection (1) of section 29A.

On April 13, 1972, the second defendant by notification in the Federal Gazette declared the Port Swettenham harbour area to be a pilotage district. This area included *all* the areas in which the plaintiff firm had been carrying on their business.

The plaintiffs wrote to the Port Klang Authority, the second defendant, and received a reply dated March 31, 1972, as follows:

"Take-Over of Pilotage Service

In reply to your letter dated 27.3.72 in regard to the taking over of pilotage assets, I am directed to advise you that this Authority has been directed by the Ministry of Communication to take over the Pilotage Services with effect from 1st May, 1972. Therefore, in so far as the date for taking over of assets is concerned, this will be a few days before 1st May, but in so far as the payment is concerned, this will be subject to further correspondence."

It is clear from the above that the plaintiffs were informed that the second defendant would take over the pilotage service within Port Swettenham with effect from May 1, 1972.

It is clear that from that date the plaintiffs ceased to carry on their pilotage business in the port, that the second defendant took over the physical assets of the plaintiffs such as launches and so on and paid compensation for the same but refused to compensate the plaintiffs for the loss of their goodwill and for loss of future profits.

It is clear that after May 1, 1972, only the second defendant has been providing pilotage service in Port Swettenham.

The plaintiffs sued the Government of Malaysia, as the first defendant, and also the second defendant, for compensation for loss of goodwill.

Alternatively the plaintiffs claim a declaration that section 35A is unconstitutional as being inconsistent with article 13 of the Federal Constitution which reads:

"13. (1) No person shall be deprived of property save in accordance with law.

(2) No law shall provide for the compulsory acquisition or use of property without adequate compensation."

The defendants deny liability.

At the commencement of the trial two issues were agreed:

(1) whether the act of the defendants was unconstitutional; and

(2) whether the defendants were liable to pay compensation.

The quantum, it was agreed, should be left to be determined later.

The learned trial judge decided in favour of the defendants, and the plaintiffs appeal to us.

There are four grounds of appeal.

First, it is argued that the learned judge was wrong in holding that sections 29A and 35A were aimed at providing further and better facilities and to promote a more efficient service.

Second, it is argued that the learned judge was wrong in holding that the plaintiffs had not by virtue of section 35A been completely restrained from pursuing their vocation.

Third, it is argued that the learned judge was wrong in holding that Parliament was acting within their powers under the Constitution when they enacted section 35A.

Fourth, it is argued that the learned judge was wrong in holding that the prohibition imposed by section 35A was not an acquisition or use of property within the meaning of clause (2) of article 13.

I think that I can dispose of the third argument first. In my view, as clause (1) of article 74 provides that Parliament may make laws with respect to any matter in the federal list and as the federal list includes shipping and navigation (see item 9 of schedule 9), it is quite plain that Parliament has power to enact section 35A. But that still leaves open the question whether or not that section is valid in view of article 13. I shall return to this question in a moment.

The main issues in this appeal are first whether the plaintiffs had any goodwill in their business, second whether that goodwill was property and third whether that property has been acquired by the defendants. If the answer to all three questions is in the affirmative, then it is clear that the plaintiffs are entitled to compensation, which is what the plaintiffs are mainly interested in.

The defendants argued before us that the licences issued to members of the plaintiffs' firm were a privilege, not property, that the firm had a monopoly and without competition there could be no goodwill (the defendants agree that goodwill is property), and that the plaintiffs have not been deprived of property if they had any property in their business which is denied.

I shall deal first with the question whether or not the plaintiffs had any goodwill, regarding which the learned judge unfortunately made no finding. The uncontroverted evidence is to this effect: that the plaintiffs' business commenced in 1946, that nobody else but only the plaintiffs provided pilotage services in this harbour area, that the plaintiffs are a partnership, that the partnership employed partners and non-partners as pilots, that when a new partner came in he paid a capital sum to the partnership, and that the partnership owned launches and things of that kind. The defendants contend that as the plaintiffs enjoyed a monopoly they could not have had any goodwill. With respect I do not agree. In view of the uncontroverted evidence, I think that it would have been reasonable if the learned judge had found as a fact that there was goodwill in the business. The fact that the plaintiffs enjoyed a monopoly only affects the value of the goodwill, about which we are not at this stage concerned.

I therefore proceed on the basis that there was goodwill in the business run by the plaintiffs.

Next I should deal with the question whether goodwill is property, but before doing so I should deal with the question what property in article 13 means. It is nowhere defined in the constitution, though the word is used elsewhere, for instance, in article 19. With respect I agree with Ghulam Hassan J. who said at page 139 in *Dwarkadas Shrinivas* v. *The Sholapur Spinning & Weaving Co. Ltd. and Others*[1] when discussing article 31 of the Indian constitution which approximates to our article 13:

"Having regard to the setting in which Article 31 is placed, the word 'property' used in the article must be construed in the widest sense as connoting a bundle of rights exercisable by the owner in respect thereof and embracing within its purview both corporeal and incorporeal rights. The word 'property' is not defined in the constitution and there is no good reason why to restrict its meaning."

In view of the above passage, I think that the defendants are right when they concede before us that goodwill constitutes property. For as was stated by Lord MacDermott L.C.J. at page 110 in *Ulster Transport Authority* v. *James Brown & Sons Ltd.*[2] where

the plaintiffs claim to have been legislated out of their business by a law attacked for unconstitutionality,

"loss [there, assuming that only goodwill was lost] is a loss of property because it is or includes a loss of goodwill."

I now turn to the next question whether or not any loss has been suffered by the plaintiffs. The learned judge answered this question in the negative, on the ground that a distinction should be drawn between on the one hand a mere negative prohibition of the enjoyment of property and on the other actual taking of the owner's property. He relied on this passage from the judgment at page 467 of Wright J. in *Frances Fenwick* v. *The King*: (3)

"In the case cited in argument the matter has been discussed by high judicial authority, and I do not think it necessary to express any opinion of my own, but I shall assume that the Crown has no right at common law to take a subject's property for reasons of State without paying compensation. I think, however, that the rule can only apply (if it does apply) to a case where a property is actually taken possession of, or used by, the Government, or where, by the order of a competent authority, it is placed at the disposal of the Government. A mere negative prohibition, though it involves interference with an owner's enjoyment of property, does not, I think, merely because it is obeyed, carry with it any common law right to compensation. A subject cannot at common law claim compensation merely because he obeys a lawful order of the State."

The learned judge also relied on *Northern Road Transport Board* v. *Benson*(4) where Andrew C.J. said at page 147:

"There is in my judgment a fundamental and well recognised distinction between taking or authorising property to be taken without paying compensation, this involving an actual use or taking of property into possession, and a negative or restrictive provision which merely involves interference with the owner's enjoyment of property."

With respect to the learned judge in the instant case, I do not think that *Benson's* case, *supra*, can be relied on. There the question was the constitutionality of a law enacted by the Northern Ireland Parliament, namely section 15(1) of the Road and Railway Transport Act (Northern Ireland) 1935. Its validity was attacked on the ground that it was *ultra vires* section 5(1) of the Government of Ireland Act, 1920, which restricts the legislative power of the Northern Ireland Parliament. That section provides:

"In the exercise of their power to make laws under this Act neither the Parliament of Southern Ireland nor the Parliament of Northern Ireland shall make a law so as either directly or indirectly to .... take any property without compensation."

Eventually that case went up on appeal to the House of Lords, see 1942 A.C. 520, where it was held that the judgment had been pronounced without jurisdiction; so it may be considered that whatever was said in that judgment was not binding, see Lord MacDermott L.C.J. at page 111 in *James Brown, supra*.

In *James Brown's* case the validity of section 18(1) of the Transport Act (Northern Ireland), 1948, was attacked on the ground that it contravened the same section 5(1) of the Government of Ireland Act, 1920, referred to in *Benson's* case, *supra*. Section 18(1) prohibits the use by any person other than the Ulster Transport Authority of a motor vehicle on a public highway to carry for reward any passengers or luggage or merchandise except with the consent of the Authority and the approval of the Ministry of Commerce. Section 19(1) excepts from the restrictions imposed by section 18(1) the use by furniture removers of motor vehicles "to move furniture or effects, not being part of the stock in trade of the owner thereof, from or to premises occupied by such owner to or from other premises occupied by such owner or to or from a store." Furniture which had been purchased as stock in trade by a dealer at an auction was carried by the respondents, a firm of furniture removers, from the auction to the dealer's premises without the consent of the Authority and without the approval of the Ministry. The respondents were charged with an offence under section 18(1). They contended that that section was *ultra vires* the Parliament of Northern Ireland in that it provided for a taking of property without compensation contrary to section 5(1) of the Government of Ireland Act, 1920. This contention was upheld by the Court of Appeal of Northern Ireland.

Be it noted that in that case there was no question of using or taking the physical assets of the respondents, and that there was only a negative or restrictive provision merely interfering with the owner's enjoyment of his property, the property there being the goodwill of their furniture removal business which they had been carrying on since 1898; and yet it was held that the respondents' property had been taken, and taken without compensation within the meaning of section 5(1) of the Government of Ireland Act, 1920. This is contrary to the view expressed by Andrew C.J. in the earlier case of *Benson, supra*.

I now leave Northern Ireland to go over to India, as it is well known that our constitution is modelled on the Indian constitution.

The nearest Indian provision is article 31 which before April 27, 1955, read:

"31. (1) No person shall be deprived of his property save by authority of law.

(2) No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given."

The construction of that provision came up before the Indian Supreme Court in four cases:

1. *State of West Bengal* v. *Subodh Gopal Bose and Others*(5);
2. *Dwarkadas Shrinivas* v. *The Sholapur Spinning and Weaving Co. Ltd. and Others, supra;*
3. *Saghir Ahmad and Another* v. *State of U.P. and Others*(6); and
4. *Deep Chand and Others* v. *The State of Uttar Pradesh and Others.*(7)

In the third case *Saghir Ahmad, supra*, certain private bus operators were deprived of their right to run buses on certain routes, but their physical assets were not taken over and the State of Uttar Pradesh itself decided to provide bus services on these routes under the authority of the Uttar Pradesh Road Transport Act (Act II of 1951). The Act provided for no

compensation. Its validity was attacked on the ground that it offended against article 31(2). The High Court held that it was valid. On appeal the Supreme Court held that it was void as it offended against article 31 (2). Delivering the judgment of the court, Mukherjea J. said at page 740:

"(25) According to the High Court therefore, mere deprivation of the petitioners' right to run buses or their interest in a commercial undertaking is not sufficient to attract the operation of Article 31(2) of the Constitution as the deprivation has been by the authority of law within the meaning of Clause (1) of that article. Clause (2) could be attracted only if the State had acquired or taken possession of this very right or interest of the petitioners or in other words if the right of the petitioners to run buses had been acquired by or had become vested in the Government. The State, it is pointed out, has an undoubted right to run buses of its own on the public thoroughfares and they do not stand on the rights of the petitioners.

This argument, we think, is not tenable having regard to the majority decision of this court in the cases of — *'State of West Bengal* v. *Subodh Gopal Bose'*(5) and *'Dwarkadas Shrinivas* v. *Sholapur Spinning and Weaving Co. Ltd.', supra.* In view of that majority decision it must be taken to be settled now that Clauses (1) and (2) of Article 31 are not mutually exclusive in scope but should be read together as dealing with the same subject, namely, the protection of the right to property by means of limitations on the State's powers, the deprivation contemplated in Clause (1) being no other than acquisition or taking possession of the property referred to in Clause (2). The learned Advocate-General conceded this to be the true legal position after the pronouncements of this court referred to above. The fact that the buses belonging to the appellants have not been acquired by the Government is also not material. The property of a business may be both tangible and *intangible.* Under the statute the Government may not deprive the appellants of their buses or any other tangible property but they are depriving them of the *business* of running buses on hire on public roads. We think therefore that in these circumstances the legislation does conflict with the provision of Article 31(2) of the Constitution and as the requirements of that clause have not been complied with, it should be held to be invalid on that ground." (My italics.)

In the second of the Supreme Court decision cited above Sastri C.J. said at page 99 that the expression "shall be taken possession of or acquired" in clause (2) of article 31 —

"implies such an appropriation of the property or *abridgement of the incidents of its ownership* as would amount to a deprivation of the owner."

From the above it is clear that in India at any rate before April 27, 1955, a person may be deprived of property or his property may be taken possession of or acquired even if there has been no transfer of the ownership or right to possession of that property to the State or to a corporation owned or controlled by the State.

That construction did not appeal to the Indian Government who desired to nationalise certain economic activities, and so article 31 was amended by the Constitution (Fourth Amendment) Act, 1955. Here it is necessary to notice only the new clause (2A) added to article 31 effective from April 27, 1955, which reads —

"(2A). Where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property."

Basu in his Commentary on the Constitution of India, 5th edition, 2nd volume, states at page 183:

"Clause (2A). This clause has been inserted with a view to supersede the decisions in the cases of *Subodh Gopal, supra; Dwarkadas, supra* and *Saghir Ahmad, supra.* It will no longer be possible for the courts to take any extended view of 'acquisition' as was taken in the above cases."

K. Subba Rao J. in the fourth Supreme Court case cited above said at page 654:

"The effect of the amendment is that unless the law provides for the transfer of ownership or right to possession of any property to the State or to a corporation owner or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisition of property within the meaning of [Article 31] and therefore where there is no such transfer, the condition imposed by clause (2) .... is not attracted."

Having examined the authorities cited from Northern Ireland and from India, it is now time for me to state my conclusion. With respect to the judges in those countries, I would agree that on the construction of our article 13, in Malaysia too a person may be deprived of his property or his property may be acquired by or on behalf of the State by a mere negative or restrictive provision interfering with his enjoyment of the property, even if there has been no transfer of the ownership or right to possession of that property to the State or to a corporation owned or controlled by the State.

The language of our article 13 is not identical with, but it certainly approximates to, the language of the Indian article 31 before the 1955 amendment which added the new clause (2A). The absence of a similar clause from our article 13 persuades me to adopt the construction placed on the Indian article by the Indian Supreme Court on the unamended article 31.

Applying the law as understood by me, I would therefore allow this appeal. The plaintiffs have been legislated out of business; while it is true that they were not deprived of the physical assets of their business, nevertheless they have suffered an abridgement of the incidents of its ownership, they have been deprived of the business of supplying pilotage service in Port Swettenham though only by a negative or restrictive provision interfering with the enjoyment of their property. As the impugned section 35A omits to provide for adequate compensation, it contravenes article 13 of our constitution, though it is within Parliament's competence to enact that law.

Accordingly there shall be a declaration in terms of prayer 1, namely that the plaintiffs are entitled to compensation for the goodwill of their business of which they have been deprived. During the course of arguments before us, it was stated that that is all that the plaintiffs are now interested in, and so we make no further order, except that the defendants shall pay the costs of this appeal, and costs below, and that this matter be remitted to the trial court so that the quantum may be ascertained.

Lee Hun Hoe C.J. (Borneo) (read by **Suffian L.P.**): Appellants/plaintiffs are a firm which carried on the only kind of business in this country, that is, by providing pilotage services at Port Swettenham. The firm started business in 1946 and was registered in 1954 under the Registration of Businesses Ordinance, 1953. Since September 12, 1969 it was run by six partners who were licensed pilots. Business was conducted

from premises rented from second respondent/second defendant. The firm owned launches and other material assets.

The functions of Port Authorities are laid down in the Port Authorities Act, 1963. As part of the nationalisation of the port operation, it became necessary for the second respondent to provide various services of their own such as security, stevedoring, supply and pilotage which were previously provided by others. In order to enable the port to provide the requisite facilities certain legislations were promulgated. These resulted in the second respondent taking over all the services. For instance, the stevedoring services which were provided by four private companies were taken over and the company received $5 million as compensation. In the case of pilotage services, second respondent took over such services as from May 1, 1972 and compensation was paid for the launches and other material assets belonging to appellants. However, appellants asked second respondent to pay them for goodwill and loss of future profits but second respondent refused. Consequently, appellants sued respondents by seeking for a declaration that they are entitled to compensation for goodwill of their business which were compulsorily acquired by second respondent by virtue of sections 5 and 6 of the Port Authorities (Amendment) Act, 1972 resulting in section 29A and 35A being added to the Port Authorities Act, 1963. Alternatively, they seek a declaration that the provisions of section 29A and 35A of the Port Authorities Act, 1963 are unconstitutional and of no effect. They also claim damages and other reliefs.

During the trial in the High Court the parties agreed that quantum of damages should be deferred until two issues were decided. First, whether the property compulsorily acquired by second respondent was constitutional or not. Secondly, whether compensation was payable or not. The learned judge held that section 35A was not unconstitutional and that as there was no acquisition of property within the meaning of Article 13 of the Federal Constitution, appellants' claim, therefore, failed. Appellants appealed.

In the exercise of its powers under Articles 44 and 74(1) of the Federal Constitution, Parliament, by enacting sections 5 and 6 of the Port Authorities (Amendment) Act, 1972 added new sections 29A and 35A to the Port Authorities Act, 1963. These two new sections read as follows: —

"29A (1) The authority may from time to time by notification in the *Gazette* declare any area in the port or the approaches to the port to be a pilotage district.

(2) Every such declaration shall define the limits of the pilotage district.

(3) Notwithstanding the provisions of the Merchant Shipping Ordinance, 1952 the provisions of this Part shall apply to any pilotage district declared under this section.

35A (1) Any person who, not being an authority pilot, engages in any pilotage act or attempts to obtain employment as a pilot of a vessel entering or being within any pilotage district shall be guilty of an offence under this Act and shall be liable on conviction to a fine not exceeding one thousand dollars.

(2) Any master or owner of a ship entering or being within any pilotage district who knowingly employs as pilot any person who is not an authority pilot shall be guilty of an offence under this Act and shall be liable on conviction to a fine not exceeding one thousand dollars.

(3) For the purpose of this section an authority pilot acting beyond the limits for which he is licensed or in contravention of any conditions imposed under the provisions of section 29H, shall be deemed not to be an authority pilot.

(4) Any person may, without subjecting himself or his employer to any penalty, act as the pilot of a vessel entering or leaving any pilotage district when such vessel is in distress or under circumstances making it necessary for the master to avail himself of the best assistance that can be found at the time."

Clearly the purposes of these provisions are (a) to enable second respondent to provide pilotage services within certain district as may be declared and (b) to prohibit any person who is not an authority pilot from providing pilotage services within the said district. In fact, on April 13, 1972, second respondent by notification in the Federal Gazette declared the Port Swettenham harbour area to be a pilotage district. It was not in dispute that prior to May 1, 1972 before the above provisions came into existence pilotage services were solely provided by appellants in the said district. To be blunt, they were legislated out of business. However, respondents contended that this did not affect the constitutional validity of the provisions.

The total effect of the provisions was to prohibit not only appellants but also others from carrying on business of pilotage services in the said business. So, they were alone affected. The result is that appellants contended that second respondent had compulsorily acquired their property and since no compensation had been paid for the acquisition of their property section 35A is unconstitutional being in breach of Article 13 of the Federal Constitution. Article 13 reads: —

"1. No person shall be deprived of property save in accordance with law.

2. No law shall provide for the compulsory acquisition or use of property without adequate compensation."

Take for instance, section 35A which is such a law as envisaged under Clause 2 of Article 13. But, it makes no provision for adequate compensation. In which case persons like appellants would say they have been deprived of property but that such deprivation is not in accordance with law because compensation was not paid. Therefore, they say that section 35A is unconstitutional.

As to the validity of section 35A the learned judge said this in his judgment at page 74 of the Appeal Record: —

"After careful analysis I am satisfied that in view of Article 74 of the Federal Constitution and in consideration of the matters in respect of which Parliament is empowered to legislate there is no validity in the plaintiffs' allegation that Parliament was incompetent to enact these provisions. I am also satisfied that Parliament, in enacting section 35A of the Act, had acted within the power conferred by the Constitution when it imposed a prohibition, directed to all persons other than the authority, against engaging in any pilotage act within the pilotage district."

I think the learned judge was right in holding that Parliament was competent to make such law. However, with respect, I am not so certain that he was right in saying that it merely imposed a general prohibition to prevent anyone from carrying on pilotage services in the pilotage district. First, the only person

carrying on such business at the time was the appellant firm. Their firm monopolised such business. Their business was in fact taken over by the second respondent. Compensation was paid for their launches and other material assets. They asked how about compensation for goodwill and future profit since they were put out of business. So, the question arises whether appellants are entitled to compensation for goodwill in their business.

It was contended that appellants could not do business unless their pilots were licensed and that the licences issued to their pilots were privileges which were not property. Further, appellants firm had a monopoly as there was no competition there was, therefore, no goodwill. The result is that appellants were not deprived of property. Respondents denied that appellants had property in their business.

The learned judge was of the view that prohibition could not be construed as acquisition or use of property as contemplated by Article 13. From this finding he held that there was in fact no acquisition of property within the meaning of Article 13. Because of this he did not consider it necessary to decide whether property included goodwill. This is of course unfortunate. With respect, I think he was wrong.

There is evidence to show that there were six partners and that the partnership employed partners and non-partners as pilots. Whenever a new partner joined the partnership he had to contribute a capital sum to the partnership. They owned launches and other material assets which were necessary for their kind of business. These launches and materials were acquired by second respondent who also managed to engage some of the pilots of the partnership when they took over the pilotage business.

A person enjoying a monopoly in business is commercially in a better position since there is no competition and he gets all the business and makes all the money. It is, nevertheless, business. Providing pilotage service may be considered as a specialised business and not many people are interested unless they are qualified. These would naturally affect the value of goodwill since very few people would be interested in a business of such limited scope. In the light of the undisputed evidence, I think the learned judge should have found that there was goodwill in the business.

The next question is to decide whether goodwill is property. What meaning should be given to property in Article 13? But, nowhere in the Constitution is the word "property" defined. Although Article 160(1) states that the Interpretation and General Clauses Ordinance 1948 shall, to the extent specified in the 11th Schedule apply for the interpretation of the Constitution, the definition of "property" is not, however, included in that Schedule.

In *Ulster Transport Authority* v. *James Brown & Sons Ltd.*[2] the validity of section 18(1) of the Transport Act (Northern Ireland) 1948 was challenged on the ground that it did not provide for payment of compensation. Section 5(i) of the Government of Northern Ireland Act 1920 provides that Parliament shall not "take any property without compensation." In that case respondents had since 1898 been carrying on a transport business. The 1948 Act prohibited any other person than appellant authority from carrying that kind of business except with the consent of the authority and approval of the Ministry. Respondents transported furniture for a dealer who purchased the furniture at an auction without obtaining consent from the authority or approval of the Ministry. Respondents were prosecuted for committing an offence under the 1948 Act and convicted by the resident magistrate. The Divisional Court allowed the appeal on the ground that section 18 of the 1948 Act prohibiting the carrying of the goods was void because it infringed section 56 of the 1920 Act in that it did not provide for the loss of goodwill. The decision was unanimously upheld by the Court of Appeal. It is interesting to note that the prohibition there does not involve using or taking over physical assets of the respondent. The prohibition merely interfered with respondent's enjoyment of his property which was the goodwill of their furniture removal business which had been established since 1898. The Court of Appeal regarded the goodwill of the business to be property within the meaning of section 5(1) of the Government of Ireland Act, 1920.

The learned judge considered that appellants had not suffered any loss. He distinguished between mere negative prohibition of the employment of property and actual taking over of property. Since there was merely a negative prohibition and no actual taking of property he held that the question of compensation did not arise. He conceded to the extent that the prohibition at most interfered with appellants' enjoyment of certain property, *i.e.* goodwill, if any, but that could not be said to constitute actual taking over of such property. He based his view on *France Fenwick* v. *The King*[3] and *Northern Ireland Road Transport Board* v. *Benson.*[4]

Fenwick's case is concerned with the Crown's common law right to interfere with a subject's property without paying compensation. Wright J. said that a mere negative prohibition, though it involved the interference with an owner's enjoyment of property, did not carry with it common law right to compensation. Where property had been taken or used by the Government then would an owner be entitled to compensation under common law.

In this case we are dealing with the constitutional right of an owner not his common law right. Unless we can equate the constitutional right with the common law right we must tread with care when applying English authorities. It is Article 13 that we have to construe. For this we are entitled to compare with similar statutory provision in other Commonwealth countries. Since our Constitution was modelled on the Indian Constitution what is more natural than to look into Indian authorities for assistance.

The Court of Appeal in *Benson's* case had to consider the validity of section 15(1) of the Road and Railway Transport Act (Northern Ireland) 1935. The learned judge seemed to place reliance on what was said by Andrew C.J. who made a distinction between actual use or taking of property and negative or restrictive prohibition merely involving interference with an owner's enjoyment of property. The learned Chief

Justice considered that section 15(1) resulted in a mere prohibition. Thus, on the basis of those two cases the learned judge held that there was no acquisition of property within the meaning of Article 13.

All I need say is that *Benson's* case eventually went to the House of Lords[8] where it was held that since the case was of a criminal nature no appeal lay from the decision of the Court of Summary jurisdiction dismissing the complaint and the whole chain of these appeals was misconceived. Viscount Simon L.C. said at page 525: —

"It cannot be disputed that the alleged breach of section 15 of the Transport Act, for contravention of which a fine of 100l. may be imposed, does not constitute a case of a civil nature': it is a criminal matter."

Then he went on at page 528: —

"The conclusion that the dismissal of the complaint is final necessarily leads to the view that the whole of the proceedings from the moment that the resident magistrate discharged the appellant are misconceived. Neither the deputy recorder nor the Court of Appeal in Northern Ireland had any jurisdiction to deal with the matter, and this also applies to the House itself."

The result is that the learned judge relied on a case which has been reversed by the House of Lords. Since the Court of Appeal had no jurisdiction in the matter the judgment was, therefore, not binding.

In Commissioners of Inland Revenue v. *Muller & Co.'s Margarine Ltd.*,[9] the phrase "property locally situate out of the United Kingdom" was held not to confine to realty only but might include the goodwill of a business. Lord Macnaghten made these observations: —

"It is very difficult, as it seems to me, to say that goodwill is not property. Goodwill is bought and sold every day. It may be acquired, I think, in any of the different ways in which property is usually acquired. When a man has got it he may keep it as his own. He may vindicate his exclusive right to it if necessary by process of law. He may dispose of it if he will — of course under the conditions attaching to property of that nature."

Respondents did not seem to dispute that goodwill was property. Their contention is that appellants' business has no goodwill attached to it. The reasons given by respondents for saying that no goodwill exists are not supported by any authority. The fact that appellants have a monopoly in the business with no one to compete does not necessarily mean that the business has no goodwill at all.

The fact that all but one partner have been offered employment by second respondent is no ground for refusing compensation if it is established that their property has been compulsorily acquired. Whether this fact would reflect on the quantum of damages is of no concern to this court at the moment. There can be no doubt that respondents were legislated out of business. They had been deprived of the right to carry on their business which was established since 1946.

Before April 27, 1955 Article 31 of the Indian Constitution reads: —

"31. (1) No person shall be deprived of his property save by authority of law.

(2) No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given."

In *Mahbub Begum* v. *Hyderabad State*[10] an Act was passed depriving persons of claims to an estate although they already had a judicial decree in their favour. The learned judge considered that Article 31(2) covered all deprivation of property and held that the Act was infringed by the absence of compensation.

In *State of West Bengal* v. *Subodh Gopal Bose*[5] Sastri C.J. with whom the other two judges agreed, said with reference to Article 31(2) that acquisition meant coming into possession of, obtaining, giving or getting as one's own and did not imply any transfer or vesting of title. He further said that it included deprivation by destruction, otherwise Article 31(5)(b)(ii) would have been unnecessary.

In *Dwarkadas Shrinivas* v. *Sholapur Spinning & Weaving Co.*[1] Mahagan J. with whom Sastri C.J. and Hasan J. concurred, said that the only cases of deprivation outside Article 31(2) were those expressly excluded by the rest of Article 31 itself. Acquisition and taking possession in clause (2) meant the same as deprivation in Clause (1).

In *Saghir Ahmad* v. *State of Uttar Pradesh*[6] sometime in 1947 the Government of U.P. conceived the idea of operating their own bus services in competition with others. Later, they decided on a monopoly. They, therefore, used the U.P. Road Transport Act (Act II of 1951) to deprive certain private bus operators of their right to run buses on certain routes. They did not take over their physical assets. The Act did not provide for compensation. As a result the validity of the Act was attacked as being contrary to Article 31(2). The High Court held that it was valid. On appeal the Supreme Court held that it was void as it contravened Article 31(2). The Supreme Court did not think that the argument that compensation would only be payable if the State had acquired or taken possession of a right or interest was tenable. The Supreme Court unanimously adopted the views expressed by the majority in the *State of West Bengal* v. *Subodh Gopal Bose*[5] and *Dwarkadas Shrinivas* v. *Sholapur Spinning & Weaving Co.*[1] that "clauses (1) and (2) of Article 31 are mutually exclusive in scope but should be read together as dealing with the subject, namely, the protection of the right to property by means of limitations on the State's powers, the deprivation contemplated in clause (1) being no other than acquisition or taking possession of the property referred to in clause (2)." In other words "deprivation" includes "acquisition or taking possession of property."

Saghir Ahmad's case[6] was followed by *Deep Chand* v. *State of Uttar Pradesh.*[7] On April 24, 1935 the Uttar Pradesh Service Development Act was passed authorising the State Government to frame a scheme of nationalisation of motor transport. The validity of the Act was challenged. Held that the Act in effect prohibits carriage operators from doing their motor transport business and deprives them of their property and interest in a commercial undertaking within the meaning of Article 31(2) of the Constitu-

tion. It follows that if the Act does not provide for compensation, the Act must be invalid being in conflict with Article 31(2).

It is interesting to note that in that case question arose as to whether the test of validity should be under the original Article 31 or under the new Article (with clause 2(A)). The amendment to the Constitution by the introduction of a new clause 2(A) to Article 31 by the Constitution (Fourth Amendment) Act, 1955 came into effect on April 27, 1955. It came three days too late to affect the decision of the court in that case.

The cases in India show quite clearly that persons may be considered to have been deprived of his property as a result of his property having been acquired or taken into possession by the State. This is so even though there has been no actual acquisition or taking over of property by transfer of ownership of that property to the State or other statutory bodies controlled by the State. In order to overcome the difficulty created by consensus of judicial decisions the Constitution was amended by the Indian Government who at that time intended to nationalise certain economic activities.

Clause 2(A) was added to Article 13 of the Constitution by the Constitution (Fourth Amendment) Act, 1955. It reads: —

"Where a law does not provide for the transfer of the ownership or right of any property to the State or to a corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property notwithstanding that it deprives any person of property."

There is no equivalent to clause 2(A) in our Constitution. We must, therefore, compare our constitutional provisions to similar provisions in India before the Constitution (Fourth Amendment) Act, 1955. That is to the position in India before April 27, 1955.

Although our Article 13 is not word for word similar to Article 31 of the Indian Constitution, the substance is parallel. There is no reason why the construction based on Article 31 before clause 2(A) was added, by the Supreme Court of India should not be adopted in respect of our Article 13. Accordingly, under Article 13 a person may be deprived of his property if a mere negative or restrictive provision results in interfering with the enjoyment of his property without any actual acquisition or taking over of property by the State or statutory bodies under the control of the State.

In the light of the authorities, I would hold that as section 35A does not provide adequate compensation for depriving appellants of property it is in conflict with Article 13 of the Constitution. The appellants shall be entitled to the declaration to the effect that appellants are entitled to compensation for the goodwill of their business which had been compulsorily acquired by the second respondent.

The appeal is allowed with costs.

Ali F.J. concurred.

Appeal allowed.

Solicitors: *K. Y. Foo & Co.; Tunku Zuhri, Manan & Abdullah.*

PORT SWETTENHAM AUTHORITY v. T.W. WU AND COMPANY (M) SDN. BHD.

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Ali F.J.) March 8, 1975]

[Kuala Lumpur — Federal Court Civil Appeal No. 111 of 1974]

Contracts — Bailment — Duties and responsibilities of bailee — Loss of goods after they were unloaded at wharf — Whether port authority liable — Burden of proof — Evidence Act, 1950, s. 106 — Contract Act, 1950, ss. 104 and 105.

Port Authority — Bailee — Limitation of liability — Kelang Port Authority Bye-laws 1965, Bye-law 91(1) — Port Authorities Act, 1963, s. 29.

This was an appeal from the judgment of the High Court ([1975] 1 M.L.J. 15). The facts adduced showed that 93 cases of pharmaceutical goods had been unloaded at Port Klang and kept in the custody of the Port Swettenham Authority. Subsequently only 29 cases were collected by the respondents. Subsequently part of the missing goods were recovered in shops in Kuala Lumpur. The respondents brought an action for breach of contract and/or conversion of the remaining 64 cases. It was held that the appellants, the port authorities, were liable as they had failed to show that they had exercised due care and diligence. The appellants appealed.

Held, dismissing the appeal: (1) in cases where the bailor and bailee relationship has been established all that the plaintiff has to do is to prove that he entrusted the goods to the defendant who could not deliver them on demand. It would then be for the defendant as bailee to show that the loss was not due to his negligence;

(2) in this case the learned judge was correct in holding that the appellants were negligent considering the circumstances under which the goods disappeared, the nature, bulk and weight of the goods and the system of security;

(3) Bye-law 29 of the Port Swettenham Authority Bye-laws did not affect the onus of proof but only dealt with limitation of liability.

Cases referred to:-

(1) *General and Finance Facilities Ltd.* v. *Cooks Cars (Romford) Ltd.* [1963] 1 W.L.R. 644, 648.

(2) *Joseph Travers & Sons Ltd.* v. *Cooper* [1915] 1 K.B. 73.

(3) *Phipps* v. *The New Claridge's Hotel Ltd.* (1905) 22 T.L.R. 49.

(4) *J. Spurling Ltd.* v. *Bradshaw* [1956] 2 All E.R. 121, 125.

(5) *Dwarka Nath Pai Mohan Chandhuri* v. *Rivers Steam Navigation Co. Ltd.* A.I.R. (1917) P.C. 173; (1918) 46 I.C. 319, 321.

(6) *Secretary of State* v. *Ramdhan Das Dwarka Das* (1934) 150 I.C. 189.

(7) *Coggs* v. *Bernard* (1703) 2 Ld. Raym. 909.

(8) *Abdul Rahman* v. *Ariffin* [1956] M.L.J. 89.

(9) *Gee Hup & Co.* v. *Yeo Swee Hern Trading as Chop Yong Pee Huat* [1935] M.L.J. 66.

(10) *Mackenzie* v. *Cox* 173 E.R. 987.

(11) *Coldman* v. *Hill* [1919] 1 K.B. 443.

(12) *Sharikat Lee Heng Sdn. Bhd.* v. *Port Swettenham Authority* [1971] 2 M.L.J. 27.

(13) *Yong Tong Hong* v. *Siew Soon Wah & Ors.* [1971] 2 M.L.J. 105.

(14) *Hajara Singh* v. *Muthukaruppan* [1967] 1 M.L.J. 167.

(15 *Lee Ah Low* v. *Cheong Lip Kien* [1970] 1 M.L.J. 7.

(16) *T.O. Thomas* v. *K.C.I. Reddy* [1974] 2 M.L.J. 87.

(17) *Nagappa Rengasamy Pillai* v. *Lim Lee Chong* [1968] 2 M.L.J. 91.

(18) *Hunt & Winterbotham Ltd.* v. *B.R.S. (Parcels) Ltd.* [1962] 1 Q.B. 617, 634

(19) *Brooks Wharf and Bull Wharf Ltd.* v. *Goodman Brothers* [1937] 1 K.B. 534.